Supreme Court, U.S.
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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

FREE AIR CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED FOR REVIEW

(a) Whether the action of a Federal administrative agency (the Federal Communications Commission), in dismissing with prejudice the application of the Petitioner on the basis of a failure to prosecute its application which resulted from the inability of its principal to be deposed or to give live testimony at an agency hearing because she was suffering from cancer and undergoing post-surgery radiation treatments, is "arbitrary and capricious," a denial of "due process" under the Fifth Amendment, and in direct conflict with established precedent of this Court in Societe Internationale v. Rogers, 357 U.S. 197 (1958)?

(b) Whether this Court's precedent in Link v. Wabash Railroad Co., 370 U.S. 626 (1962), upholding the authority of tribunals to dismiss litigants for failure to prosecute, should be expressly limited to situations where there is a protracted pattern of delay or neglect by the dismissed party, and not a single instance of delay or neglect where lesser sanctions would be appropriate?

(c) Whether a Federal agency engages in gender discrimination by refusing to grant a continuance of a hearing in spite of an essential witness, who is a woman, being medically incapacitated from testifying at the hearing because she was suffering from "breast" cancer, and then by dismissing the application, in which the woman is a principal, for failure to prosecute because she did not testify at the hearing?

PARTIES TO THE PROCEEDING

The following persons or entities were parties to the Federal Communications Commission proceeding in MM Docket No. 88-306 and to the appeal before the U.S. Court of Appeals for the D.C. Circuit in Case No. 95-1490:

Federal Communications Commission
Triangle FM Broadcasters, L.L.C.
Bernard Dawson
Peebles Broadcasting Company
James S. Lee and Donald L. Baker
d/b/a Interactive Media
Free Air Corporation

Free Air Corporation is a North Carolina for-profit business corporation, which was incorporated in 1986. The principals are Olga V. Castellanos and Sara J. Estrada. The corporation is not publicly owned, nor is it affiliated with any other entity. No debt securities have been publicly issued. The sole activity of the corporation is to engage in radio broadcasting.

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The Orders of the U.S. Court of Appeals for the D.C. Circuit denying the relief requested by the Petitioner, which are unreported, are cited in the Table of Authorities and included in the Appendix.

JURISDICTION

The D.C. Circuit in Order, Case No. 95-1490, filed May 22, 1996, denied the Petitioner's motion for stay of the decisions of the Federal Communications Commission ("FCC") dismissing with prejudice its application for a new FM broadcast construction permit, its motion for summary reversal of the decisions of the FCC, and its motion for remand to the FCC, and granted in part the Intervenor's motion for summary affirmance. In Order, filed August 28, 1996, the D.C. Circuit summarily affirmed the remainder of the decisions of the FCC dismissing the Petitioner's application. In Order, filed January 28, 1997, the D.C. Circuit denied a petition for rehearing (App. 33a-36a). The Court's jurisdiction is timely invoked under 28 U.S.C. 1254 (1). All required parties have been served.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved herein is the Fifth Amendment, which provides in pertinent part that no person shall be deprived of life, liberty, or property, without "due process" of law.

STATEMENT OF THE CASE

The petition for writ of certiorari arises out of the Federal Communications Commission's ("FCC") MM Docket No. 88-306, which is a "comparative" hearing proceeding under the "standard comparative issue," for a construction permit for a new FM radio broadcast station in Raleigh, North Carolina. The Petitioner, Free Air Corporation ("Free Air"), filed its application on July 7, 1986. Its principals are Hispanic females.

Free Air's application and some twenty other ones were designated for hearing in 1988. Hearing Designation Order, 3 FCC Rcd 4375 (MMB 1988). Free Air actively participated in the hearings which were held from 1989 through 1992, filed proposed findings and conclusions, filed exceptions, and timely met all procedural deadlines in prosecuting its application. There is no record evidence to the contrary.

After exceptions to the Administrative Law Judge's ("ALJ") decisions were appealed by the competing applicants to the Review Board of the FCC in 1992, the Board took no action in the proceeding until September 1994. There is no record evidence that any prior delays in the proceeding were caused by Free Air.

The FCC proceeding was initiated pursuant to the Policy Statement on Comparative Hearings, 1 FCC2d 393 (1965).

However, Bechtel v. FCC 10 F.3d 875 (D.C. Cir. 1993) ruled that the FCC's "integration" selection criteria for "comparative" hearings was "arbitrary and capricious" and was "peculiarly without foundation."

As a result of Bechtel, the FCC froze or held in abeyance the processing and prosecution of applications which were already in hearing. This included the specification of new basic qualifying issues. FCC Freezes Comparative Hearings, 9 FCC Rcd 1055 (1994); and Modification of FCC Comparative Proceedings Freeze Policy, FCC 94-204, rel. August 4, 1994 ("Freeze Orders").

After the FCC's adoption of the "Freeze Orders," the Review Board, in Rem Malloy Broadcasting, 9 FCC Rcd 4822 (Rev. Bd. 1994), nevertheless acted upon a late-filed motion to reopen the record (over two years late) and specified a financial qualifications issue against Free Air. However, the Board conceded that the opposing applicant who filed the motion had admittedly presented no adverse information about Free Air's financial qualifications. Id., 4822, para. 3, 4829-4830, paras. 28 and 30, n. 17.

After specification of the financial qualifications issue and remand to the ALJ in September 1994, Free Air timely complied with the document discovery requests of the opposing applicants. This included documents and affidavits from

Free Air's principals showing the basis of its 1986 financial certification and its means of reliance for financing the proposed station (App. 3a).

However, Free Air was unable to produce for deposition its principal, Olga V. Castellanos, who was responsible for its financial certification in its 1986 application. This 1986 certification was the focus of the financial qualifications issue, which was first specified by the Review Board in 1994 (App. 2a).

In 1994-1995, Mrs. Castellanos was suffering from cancer, had recently undergone surgery, and was undergoing radiation treatments in a Miami, Florida, hospital. She was then 66 years old. Her medical condition was verified by a doctor's affidavit (App. 2a).

The opposing applicants sought to depose Mrs. Castellanos, but were unable to contact her doctor in Miami to get his approval for a deposition (App. 3a). They then filed with the ALJ, on December 22, 1994, a motion for continuance of the upcoming January 1995 supplemental hearing because of her ill health. Free Air supported the continuance (App. 1a).

The ALJ denied the motion for continuance in Memorandum Opinion and Order, FCC 95M-4, rel. January 9, 1995 (App. 1a-4a). According to the ALJ, the opposing applicants did not make a reasonable or sufficient effort to depose

Mrs. Castellanos. The ALJ then ruled that she would be an "essential" witness to testify at the hearing (App. 3a-4a).

The ALJ, moreover, ruled that there was no basis to delay a hearing on the financial qualifications of another competing applicant, Rem Malloy (App. 3a). However, this issue was unrelated to the financial qualifications specified against Free Air and was to be tried separately. Rem Malloy Broadcasting, 9 FCC Rcd 4822, 4823-4827 (App. 22a).

Discovery closed on December 31, 1994. On the January 17, 1995, date for the exchange of hearing exhibits, Free Air filed with the ALJ a motion to delete the specified financial issue (App. 5a).

Submitted in the motion to delete was a showing and documentation as to Free Air's 1986 financial certification. It included an affidavit from Mrs. Castellanos as to the basis of the 1986 financial certification. This documentation had been produced to the opposing applicants during discovery (App. 3a, 8a-9a).

Free Air elected to prosecute its application on the financial qualifications issue through the motion to delete because of the inability of Mrs. Castellanos to give live testimony at the January 1995 hearing in view of her life threatening medical condition. In a letter to the ALJ prior to the hearing,

Free Air's counsel reaffirmed Mrs. Castellanos' inability to travel to Washington, D.C. from Miami in order to give live testimony (App. 13a-14a).

Because the ALJ had refused to continue the hearing in spite of Mrs. Castellanos' life threatening medical condition and had also named her an "essential" witness at the hearing, Free Air indicated in the letter to the ALJ that it was forced to rest its case on the motion to delete in order not to be in default in prosecuting its application. Counsel for Free Air, further noted in the letter that in view of Free Air resting its case on the motion to delete, neither he nor Free Air would be in attendance at the January 1995 hearing (App. 13a-14a).

The motion to delete was properly and timely filed pursuant to 47 C.F.R. 1.229 (b)(3) and (c). However, in Memorandum Opinion and Order, FCC 95M-48, rel. February 14, 1995, the motion to delete was dismissed by the ALJ on procedural grounds. According to the ALJ, the motion was not timely filed. Moreover, the ALJ did not believe that Free Air's showing in the motion as to its 1986 financial certification would resolve the specified issue (App. 8a-9a).

On February 3, 1995, the opposing applicants, who had filed the motion for continuance of the hearing in view of Mrs. Castellanos' life threatening medical condition, then filed a motion to dismiss

the application of Free Air for failure to prosecute. This was because Mrs. Castellanos had failed to attend the January 1995 hearing (App. 11a).

In Memorandum Opinion and Order, FCC 95M-60, rel. February 23, 1995, the ALJ granted the motion to dismiss the application of Free Air (App. 11a-20a). According to the ALJ, dismissal of Free Air's application is required because it had failed to request a continuance based upon Mrs. Castellanos' ill health, because Free Air and its counsel had defied his order to produce Mrs. Castellanos at the hearing, and because the opposing parties were prejudiced by Mrs. Castellanos' failure to appear (App. 16a, 18a, 20a).

The ALJ had previously dismissed the seriousness of Mrs. Castellanos' medical condition as only "breast" cancer (App. 2a, 12a, 17a). He, moreover, suspected that she was feigning illness in order for Free Air to avoid disclosing the basis of its 1986 financial certification (App. 16a). However, the ALJ ignored that Free Air had disclosed the basis of its financial certification in discovery through contemporaneous 1986 documents and an affidavit from Mrs. Castellanos and had included those documents in its January 17, 1995, motion to delete the financial issue (App. 3a, 8a-9a).

In Memorandum Opinion and Order, 10 FCC Rcd 4974 (Rev. Bd. 1995), the Review Board affirmed the dismissal of the

application of Free Air (App. 21a-29a). According to the Board, dismissal of Free Air's application is justified based on the reasons given by the ALJ and also because Free Air had "refused to cooperate" in having Mrs. Castellanos deposed (App. 27a). However, the Board ignored that the reason for Mrs. Castellanos not being deposed was the unavailability of her doctor to obtain his consent for the deposition (App. 3a).

In Order, 10 FCC Rcd 9502 (1995), the FCC affirmed the dismissal of Free Air's application. This was without any substantive comments as to the issue of dismissal (App. 30a-32a).

Free Air filed with the D.C. Circuit a notice of appeal of the dismissal of its application with prejudice. In Orders, Case No. 95-1490, filed May 22 and August 28, 1996, the D.C. Circuit summarily affirmed the decisions of the FCC (App. 33a-35a). In Order, filed January 28, 1997, Free Air's petition for rehearing was denied (App. 36a). It timely filed a petition for writ of certiorari on April 28, 1997.

The FCC has not yet adopted a new selection criteria for "comparative" broadcast hearings. Its "Freeze Orders" staying or holding in abeyance the prosecution of "comparative" proceedings, such as MM Docket 88-306, and "comparative" applications, such as Free Air's, remain in effect.

Nevertheless, after the dismissal of Free Air's application, the FCC allowed the five remaining applicants to settle the proceeding. Four of those applicants had been disqualified on financial grounds, which included findings of lack of candor and misrepresentation. In return for their dismissal, these applicants received "windfall" payments far in excess of their application prosecution expenses. Rem Malloy Broadcasting, 11 FCC Rcd 4064 (Rev. Bd. 1996), aff'd, FCC 96-348, rel. August 22, 1996, 11 FCC Rcd _____ (1996). See also, Further Supplemental Initial Decision, 7 FCC Rcd 8024 (ALJ 1992).

The applicant which was granted pursuant to the settlement, Bernard Dawson, had certified in 1986 that he was not financially qualified and, contrary to established FCC policy, had never amended his application to provide the required financial certification. In 1991, Free Air filed a motion to dismiss that applicant because his application was not grantable as a matter of law and under FCC policy could not be amended. The FCC never acted on the motion to dismiss. Rem Malloy Broadcasting, 11 FCC Rcd at 4065, paras. 8-9.

On January 16, 1996, Free Air timely filed a petition to deny the settlement and opposition to grant of the construction permit to an unqualified applicant, Dawson, whose application is subject to dismissal. Moreover, Free Air

objected because Dawson, the prevailing applicant, had entered into an agreement with a non-applicant, who is a local Raleigh broadcast group owner. The non-applicant will immediately acquire a 49% equity interest in the application, construct and operate the new station, and acquire an option to buy the station after it is operational. Dawson is not required to do anything in connection with the construction and operation of the new station, other than collect a guaranteed payment of over One Million Dollars upon its sale to the Raleigh broadcast group owner. Rem Malloy Broadcasting, 11 FCC Rcd 4064, at paras. 15-17.

Free Air filed with the D.C. Circuit a notice of appeal of the FCC's decisions allowing settlement of the proceeding in MM Docket 88-306 and grant of the construction permit to an unqualified applicant who will immediately sell the station to a non-applicant for a "windfall" profit. The appeal remains pending awaiting a briefing schedule (D.C. Circuit Case No. 96-1311).

REASONS FOR GRANTING THE PETITION

(a) The petition for writ of certiorari raises an important question of Federal law as to whether the action of a Federal administrative agency (the Federal Communications Commission), in dismissing with prejudice the application of the Petitioner on the basis of a failure to prosecute its application which resulted from the inability of its principal to be deposed or to give live testimony at an agency hearing because she was suffering from cancer and undergoing post-surgery radiation treatments, is "arbitrary and capricious," a denial of "due process" under the Fifth Amendment of the U.S. Constitution, and in direct conflict with established precedent of the U.S. Supreme Court in Societe Internationale v. Rogers, 357 U.S. 197 (1958)?

The application of the Petitioner, Free Air, which was before the Federal Communications Commission ("FCC") to compete for the grant of a construction permit for a new FM broadcast frequency is a "species of property" subject to protection under the "due process" clause of the Fifth Amendment. Logan v.

Zimmerman Brush Co., 455 U.S. 422, 428-431 (1982). Prior to the dismissal of its application in 1995, Free Air had invested over eight years of time and resources in prosecuting it before the FCC. See, Statement of the Case, p. 2, supra.

The action of the FCC in dismissing with prejudice the application of Free Air on the basis of a failure to prosecute its application, which resulted from the inability of its principal, Olga V. Castellanos, to be deposed or to give live testimony at an FCC hearing because she was suffering from cancer and undergoing post-surgery radiation treatments, is "arbitrary and capricious," is a denial of "due process" under the Fifth Amendment of the U.S. Constitution, and is in direct conflict with established precedent of the U.S. Supreme Court in Societe Internationale v. Rogers, 357 U.S. 197 (1958). This precedent holds that the dismissal with prejudice of a case or cause of action because of a failure to comply with a court order, where the failure is due to the "inability" of the petitioner to comply and is not the result of the petitioner's own conduct or of circumstances within its control, is a denial of "due process" under the Fifth Amendment. Id., 357 U.S. at 209, 211.

The dismissal of Free Air's application was a direct result of the inability of Mrs. Castellanos, its principal, to be deposed or to testify at an FCC hearing because she was suffering

from cancer and undergoing post-surgery radiation treatments. Her medical condition was verified by her doctor (App. 2a).

The opposing applicants requested a continuance because of the inability to contact Mrs. Castellanos' doctor to obtain his permission for a deposition. This request for continuance was supported by Free Air (App. 1a, 3a). In spite of the joint request for continuance because of Mrs. Castellanos' ill health and her inability to be deposed, the ALJ ordered the hearing to go forward and, moreover, named Mrs. Castellanos an "essential" witness to testify at the 1995 supplemental hearing (App. 3a-4a).

Prior to the 1995 supplemental hearing, Free Air disclosed the basis of its financial certification. This was done in response to discovery by submitting contemporaneous 1986 documents and an affidavit from Mrs. Castellanos (App. 3a, 8a-9a).

The record of this proceeding shows that Free Air acted in "good faith" in attempting to timely comply with the discovery requests of the opposing applicants and in attempting to timely prosecute its application, all within the limits of its ability to do so. There is nothing in the record to contrary (App. 3a, 5a-9a).

Accordingly, it is requested that

certiorari be granted. An important question of Federal law is raised which requires resolution by the Court. This question is whether the FCC acted contrary to established precedent of the Court in Societe Internationale v. Rogers, 357 U.S. 197, by dismissing with prejudice the application of Free Air, as a result of its principal's failure to be deposed or to give live testimony at a supplemental hearing, in spite of her inability to do so because she was suffering from cancer and was undergoing post-surgery radiation treatments?

> (b) The petition for writ of certiorari raises an important Federal question of law as to whether the U.S. Supreme Court's precedent in Link v. Wabash Railroad Co., 370 U.S. 626 (1962), upholding the authority of tribunals to dismiss litigants for failure to prosecute, should be expressly limited to situations where there is a protracted pattern of delay or neglect by the dismissed party, and not a single instance of delay or neglect where lesser sanctions would be appropriate?

The Court in Link v. Wabash Railroad Co., 370 U.S. 626 (1962), upheld the authority of tribunals to dismiss litigants for failure to prosecute.

However, that case involved a litigant who had engaged in a protracted pattern of delay or neglect in prosecuting its case. Link v. Wabash Railroad Co., 370 U.S. at 634-635, left unresolved the question of whether dismissal was warranted where there was no such pattern of delaying the trial, and only one unjustified absence from the courtroom where lesser sanctions would be appropriate. See, Jackson v. Washington Monthly Co., 569 F.2d 119, 121, n. 10 (D.C. Cir. 1977).

The record of this proceeding shows that there was no protracted pattern of delay or neglect by Free Air in prosecuting its application. The FCC itself delayed the resolution of MM Docket 88-306 from 1986 through 1994 because of the large number of competing applicants. Then, in 1994, the FCC froze the prosecution of such "comparative" broadcast applications because the D.C. Circuit had voided its selection criteria. Bechtel v. FCC, 10 F.3d 875; Freeze Orders, 9 FCC Rcd 1055.

Indeed, the 1995 supplemental hearing in which the ALJ found Free Air to be in default was held in apparent violation of the FCC's Freeze Orders. id. That freeze on the prosecution of "comparative" broadcast applications, such as Free Air's, still remains in effect. A Federal agency action in violation of law or in violation of its own policies is void as a matter of law. SEC v. Chenery Corp., 318 U.S. 80, 94-95 (1943).

Even assuming the actions of Free Air to be wholly unjustified or unreasonable in not producing Mrs. Castellanos for deposition or to give live testimony at the 1995 supplemental hearing, or in not attending the hearing, this is the only delay in the proceeding which could be attributed to it. The supplemental hearing that Free Air did not attend was scheduled by the FCC six years after the case was designated for hearing. Free Air, otherwise, diligently prosecuted its 1986 application from the time of designation in 1988 (App. 5a-10a).

Accordingly, it is requested that certiorari be granted. An important Federal question of law is raised which requires resolution by the Court. This question is whether the Court's precedent in Link v. Wabash Railroad Co., 370 U.S. 626, upholding dismissal for failure to prosecute, should be expressly limited to the situation where there is a protracted pattern of delay and neglect by the petitioner, and not a single instance of delay or neglect where lesser sanctions would be appropriate. Id, 370 U.S. at 634-635.

Some Federal courts have apparently differing interpretations of Link v. Wabash Railroad Co. as to this issue of the appropriate standard for dismissal for failure to prosecute. See, Jackson v. Washington Monthly Co., 569 F.2d 119, 121, n. 11. A uniform Federal policy or precedent should be adopted.

(c) The petition for writ of certiorari raises an important question of Federal law as to whether a Federal agency engages in gender discrimination in violation of the U.S Constitution by refusing to grant a continuance of an administrative hearing in spite of an essential witness, who is a woman, being medically incapacitated from testifying at the hearing because she was suffering from "breast" cancer, and then by dismissing the application, in which the woman is a principal, for failure to prosecute because she did not testify at the hearing?

The petition for writ of certiorari raises an important question of Federal law as to whether the FCC engaged in gender discrimination in violation of the U.S. Constitution by refusing to grant a continuance of an administrative hearing in spite of an essential witness, Mrs. Castellanos, being incapacitated from testifying at the hearing because she was suffering from "breast" cancer, and then by dismissing the application of Free Air, in which she is a principal, because of a failure to prosecute?

The FCC has a long-established policy of granting continuances of its

administrative hearings where an essential witness, or an applicant, is medically incapacitated from testifying at the hearing. GAF Broadcasting Co., 96 FCC2d 411, 413-416 (Rev. Bd. 1984). However, the ALJ refused to apply that policy in the case of Mrs. Castellanos, who was suffering from "breast" cancer.

The ALJ dismissed the seriousness of Mrs. Castellanos' medical condition as only "breast" cancer (App. 2a, 12a, 17a). He, moreover, suspected that she was feigning illness in order for Free Air to avoid disclosing the basis of its 1986 financial certification (App. 16a). However, the ALJ ignored that Free Air had submitted an affidavit from Mrs. Castellanos' doctor as to the seriousness of her medical condition (App. 2a). The ALJ also ignored that Free Air had disclosed the basis of its financial certification in discovery through contemporaneous 1986 documents and an affidavit from Mrs. Castellanos and had included those documents in its January 17, 1995, motion to delete the financial issue (App. 3a, 8a-9a).

The refusal of the ALJ to grant a continuance of the hearing in these circumstances constitutes gender discrimination in violation of the U.S. Constitution. Breast cancer, which is unique to women, is not considered by the FCC to be serious enough to warrant a continuance of a hearing, even though other forms of cancer or other illnesses

which are not unique to women, would constitute a basis for a continuance.

Accordingly, it is requested that certiorari be granted. An important question of Federal law is raised which requires resolution by the Court. This question is whether the FCC engaged in gender discrimination by dismissing the seriousness of "breast" cancer in denying a continuance for a hearing. Federal administrative agencies must be required to abide by the U.S. Constitution and not allow gender discrimination in their adjudicatory processes.

CONCLUSIONS

WHEREFORE, in view of the foregoing, the Court is urged to grant Free Air's petition for writ of certiorari because the actions of the FCC are in conflict with the "due process" clause of the Fifth Amendment, in conflict with established precedent of this Court, and constitute gender discrimination. Moreover, this petition raises an important issue as to whether certain precedent of the Court should be limited in scope.

Respectfully submitted,

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Appendix

APPENDIX A, MEMORANDUM OPINION AND ORDER, FCC 95M-4, MM DOCKET NO. 88-306, REM MALLOY BROADCASTING, rel. January 9, 1995

1. Under consideration are "Joint Motion for a Continuance of Procedural Dates" filed December 22, 1994, by Interactive Media and Peebles Broadcasting Company (Petitioners); "Opposition to Joint Motion for Continuance" filed December 28, 1994, by Rem Malloy Broadcasting (Rem Malloy); and "Response to Joint Motion for Continuance" filed December 30, 1994, by Free Air Corporation (Free Air).

2. Petitioners seek a four-month continuance of the procedural dates established for the trial of the financial issues specified against Free Air and Rem Malloy./1 The Joint Motion will be denied.

3. Discovery in this proceeding was initially to be completed by November 1, 1994, and the hearing was to begin on December 5, 1994. Subsequently, the date for completion of discovery was extended to December 31, 1994, and the hearing continued to January 30, 1995. (Order, FCC 94M-524, rel. Sept. 13, 1994.) Petitioners have failed to show good cause for further extending the procedural dates.

/1 In its Memorandum Opinion and Order, FCC 94R-14, rel. Sept. 12, 1994, the Review Board remanded this proceeding to the Presiding Judge for hearing on the above issues. The Commission recently rejected various appeals from the Board's ruling. See Public Notice, Report No. DC-2697, issued Dec. 27, 1994.

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4. Free Air is a corporation owned equally by Sara J. Estrada and Olga V. Castellanos. Free Air has asserted that in certifying that it was financially qualified, it was relying on Castellanos to provide the funds necessary for construction and initial operation of the proposed station. At the conference held on November 2, 1994, counsel for Free Air produced an affidavit from Castellanos' doctor stating that Castellanos was recovering from breast cancer surgery performed on October 17 and would be unable to appear for deposition until the latter part of December 19[illegible]. In light of this development, the date for completion of discovery was extended from November 1 to December 31.

5. Petitioners argue in their motion that they cannot complete discovery by the latter date. They claim that they have been unable to depose Castellanos. Further, they claim that even if Castellanos was available for deposition, they could not conduct adequate discovery because Free Air has not complied with document production requests. With respect to Castellanos' deposition, at the November 2 conference, the Presiding Judge stated that he would rule on the date for her deposition if the parties could not agree on a mutually satisfactory date. Further, it was suggested that the parties arrange a conference call with the doctor as to Castellanos' availability to be deposed in her home city of Miami, Florida, avoiding the need to travel to the original place of deposition, Raleigh,

North Carolina (Tr. 2522-2524). Petitioners assert that their efforts to arrange a conference call with the doctor have been unsuccessful. They are silent, however, why, in view of the doctor's lack of cooperation, they did not file a Notice establishing a date for her deposition or seek a ruling from the Presiding Judge. Under the circumstances, no basis exists to delay the hearing to permit a further opportunity to depose Castellanos. Moreover, even assuming Castellanos' unavailability, Petitioners' failure to depose other persons with relevant knowledge has not been explained. As noted in Free Air's response, there has been no attempt during the extended discovery period to depose Dr. Jose Castellanos, Alejandro Castellanos, and Robert Holder, who Free Air relied upon for financing./2 With respect to document production, Free Air asserts it fully complied in timely fashion with document requests and no evidence has been provided indicating otherwise. In this connection, if Free Air introduces at the hearing a document which it should have produced during deposition, the Parties may move to exclude such document.

6. Additionally, even if warrant existed for continuing the hearing involving Free Air, no showing has been made justifying delaying the hearing involving Rem Malloy. As noted by Rem Malloy, there are no outstanding discovery requests as to Rem Malloy. Moreover, Rem Malloy, who has the burden of proceeding and proof on the financial issue designated against it, has

stated it is prepared to exchange its exhibits on the designated date and to go forward with the hearing.

Accordingly, IT IS ORDERED that the Joint Motion IS DENIED./3

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin,
Administrative Law Judge

/2 Free Air has the burden of proceeding and proof on the added financial issue. The named individuals, as well as Castellanos, are essential witnesses at the forthcoming hearing on January 30, 1995.

/3 On December 30, 1994, counsel for Free Air filed a Notice of his withdrawal as counsel for Free Air and stated that all correspondence and notices be sent to Olga V. Castellanos, c/o Dr. Jose Castellanos, 10421 S.W. 67th Street, Miami, Florida 33173. A copy of this ruling is also being faxed to Free Air's former counsel who has agreed to make its contents known to Free Air. This is to insure that Free Air is made aware of this ruling as soon as possible.

APPENDIX B, MEMORANDUM OPINION AND ORDER, FCC 95M-48, MM Docket NO. 88-306, REM MALLOY BROADCASTING, rel. Feb. 14, 1995,

1. Under consideration are "Motion To Delete Issue" filed January 17, 1995 by Free Air Corporation (Free Air), Joint Opposition To Motion To Delete Issue filed January 27, 1995 by Peebles Broadcasting Company, Interactive Media and Bernard Dawson, and Reply To Joint Opposition filed February 8, 1995 by Free Air.

2. In a Memorandum Opinion and Order released on September 12, 1994, the Review Board specified a financial qualifications issue against Free Air Corporation./1 On September 19, 1994, Free Air filed with the Commission an Emergency Petition for Extraordinary Relief, which among other things, challenged the factual and/or legal basis for the addition of the issue. By Memorandum Opinion and Order, rel. January 9, 1995 (FCC 94-335), the Commission dismissed Free Air's request for extraordinary relief./2

3. Now pending before the Presiding Judge is a motion filed by Free Air to delete the financial qualifications issue added by the Board. Free Air urges that the Board's action was a mistake since the Board (and the Commission) mistakenly assumed that Free Air was relying on its 50% principal, Sara Estrada, and her husband to provide financing for the station. As revealed for the first time in an affidavit by Estrada dated October 17, 1994, Free Air is not relying on the Estradas as their source of financing.

Free Air is silent as to why it did not disclose this information to the Review Board in January 1994 when it filed an opposition to the motion to reopen the record or in its request to the Commission for extraordinary relief.

4. Free Air's motion is procedurally defective and will be dismissed. Free Air's motion was not filed within the 30 day period provided by 47 C.F.R. 1.229(b) and good cause has not been shown for its extremely tardy filing. As noted supra, the information Free Air relies on was known to Free Air in January when it filed its opposition to the motion to reopen the record. Therefore, it cannot be contended that it was not possible to file the motion within the prescribed period. Free Air argues that good cause exists for its late filing on the ground that a motion to delete the issue would have been unfair to the opposing parties if filed prior to completion of discovery. Free Air's post hoc rationalization for its failure to inform the Commission in timely fashion is rejected. Clearly, there is no possible correlation between the filing of a motion to delete and discovery. In fact, the obvious purpose for establishing a time frame for filing a motion to delete is to avoid unnecessary litigation including discovery. Consequently, Free Air's procedurally defective motion will be dismissed.

5. Even assuming arguendo, Free Air's motion was considered, it would be denied. As the Review Board held in Post-Newsweek Station, Florida, Inc., 33 RR 2d 891, 894

(1975), issues should not be deleted on the basis of material contained in pleadings or post-designation amendments "in the absence of unusual circumstances such as where the Commission overlooked or misconstrued pertinent information before it" when the issues were enlarged. See also Muncie Broadcasting Corp., 89 FCC 2d 124 (Rev. Bd. 1982). The facts here do not meet the criteria of Post-Newsweek. The alleged "mistake of fact" did not result from the Review Board overlooking material submitted by Free Air before the issues were enlarged. On the contrary, it resulted solely from Free Air's failure to inform the Review Board. Since Free Air, not the Review Board, was responsible for the mistake, Free Air's belated attempt to rectify the situation after the fact must be rejected.

6. Similarly, the unusual circumstances depicted in Salter Broadcasting Co., 8 FCC 212, 213-214, (Rev. Bd. 1967) where financial and air hazard issues were deleted based on post-designation filings, are clearly distinguishable from the instant fact situation. There, the Board's action was predicated on the unequivocal nature of the showings of the parties, the desirability of simplifying (nine applicants and 17 issues) and expediting (the facilities sought were being utilized by an interim operation) and the fact that none of the parties opposed the motion. The same exigencies are not present here and, unlike Salter, there is opposition to Free Air's motion to delete./3 More important, the documents submitted by Free

Air do not unequivocally establish that Free Air is financially qualified. On the contrary, Free Air's attachments establish that the Board's addition of a financial qualifications issue was fully justified. The attachments raise substantial questions as to the validity of Free Air's certification that it was financially qualified at the time it filed its application in 1986. These questions pertain to Free Air's estimated costs for construction and initial operation as well as the means to finance the proposed station.

7. According to Olga Castellanos, Free Air's 50% principal responsible for the financial certification, Free Air would need at least $65,000 if it leased equipment, at least $150,000 for used equipment and at least $260,000 if it obtained new equipment (Att. at p. 5). Assuming the accuracy of these estimates, Castellanos does not state which figure, if any, she used, in certifying that she had the funds to meet her cost requirements. Further, Castellanos has not demonstrated she has the funds to meet any of these cost figures. Castellanos asserts she is relying on loans from her husband and son to meet her costs (Att. at p. 5). Aside from the fact that the documents submitted do not include affidavits from the husband and son confirming this oral loan agreement, the "Fiscal Year 1985-1986" financial statement for Castellanos and her husband show liquid assets of only $11,000 and Free Air produced no 1986 financial statement for

her son. Id, pp. 14-15. With respect to the 1985-1986 financial statement, contrary to the assertions of Free Air in its Reply (p. 5), the non-liquid assets can not be relied on since no evidence such as appraisals, has been submitted supporting their claimed fair market value. Port Huron Family Radio, Inc., 5 FCC Rcd 4562 (1990), cited by Free Air, does not assist Free Air. Unlike Free Air, the applicant in Port Huron submitted evidentiary support for the valuations of the non-liquid assets before an adjusted value was placed on their non-liquid assets. Without such supporting evidence, non-liquid assets are not considered. See American Cellular Corp., 103 FCC 2d 26, 28 5.c. (1986)./4 In sum, Free Air's motion to delete is procedurally defective and void of substantive merit.

Accordingly, IT IS ORDERED, That the "Motion To Delete Issue" filed January 17, 1995 by Free Air Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
Joseph Chachkin, Administrative Law Judge

/1 The Review Board also specified a financial qualifications issue against Rem Malloy Broadcasting (Malloy).

/2 The Commission also denied Free Air's motion to disqualify counsel and dismissed as moot a motion for a stay.

/3 In denying Free Air's request for extraordinary relief, the Commission pointed out in para. 11 of its ruling (FCC 94-35), that Free Air could avail itself of the summary decision procedures to

correct any alleged factual errors underlying the Board's determination to add a financial issue. Free Air's decision to file an inappropriate motion to delete rather than the remedy suggested by the Commission, is somewhat baffling. In any event, it is clear that a request for summary decision founded on Free Air's attachments to its motion to delete would be denied since there are genuine issues of material fact for determination.

/4 The Commission has also deleted issues in Red Lion Broadcasting, 63 FCC 2d 145 (1977) where the collateral aspect of the res judicata doctrine was inappropriately applied and in Midwest St. Louis 65 FCC 2d 673 (1973) where a second year financial issue was added. In this connection, Free Air contends that the financial issue added by the Board was improperly specified as a matter of law and argues that the above cases are precedent for deleting the issue. The contention is rejected. Unlike the cases cited, Free Air's contention that the Board's action was illegal has not been accepted by the Commission. In rejecting Free Air's request for extraordinary relief, the Commission made clear that the proper forum for challenging the legal basis for the Board's addition of the issue is a timely filed application for review of the Board's final decision in this case (FCC 94-335 at para. 11). Moreover, any question as to whether the Board's action was legally proper appears to be moot for the reason recited in paras. 6-7, supra.

APPENDIX C, MEMORANDUM OPINION AND ORDE
FCC 95M-60, MM DOCKET NO. 88-306, RI
MALLOY BROADCASTING, rel. Feb. 23, 1995

1. Under consideration are "Joint Motio To Dismiss Free Air Application" file February 3, 1995 by Peebles Broadcastin Company, James S. Lee and Donald L. Baker d/b/a Interactive Media, Bernard Dawson and Special Markets Media, Inc. (Join Movants), Opposition To Joint Motion T Dismiss filed February 8, 1995 by Free Ai Corp. (Free Air), and Joint Reply To Fre Air Opposition To Joint Motion To Dismis filed February 15, 1995 by the Join Movants.

2. In a Memorandum Opinion and Orde released on September 12, 1994 (FC 94R-14), the Review Board specified financial qualifications issue agains Free Air./1 /2 The burdens of proceedin and proof was placed on Free Air. By Orde released September 15, 1994 (FCC 94M-524) the Presiding Judge established procedural schedule providing for hearing on December 5, 1994, for the issu added by the Board./3 The procedura schedule was modified at a conference hel on November 2, 1994. Among other things completion of discovery was extended t December 31, 1994, the date for th exchange of written direct cases wa extended to January 16, 1995 and th hearing date was continued to January 30

/1 The Board also specified a financia qualifications issue against Henry R Malloy d/b/a Rem Malloy Broadcasting.

/2 On September 19, 1994, Free Air filed with the Commission an Emergency Petition for Extraordinary Relief, which, among other things, challenged the factual and/or legal basis for the addition of the issue and sought the disqualification of counsel for Bernard Dawson. By Memorandum Opinion and Order, released January 9, 1995 (FCC 94-335), the Commission dismissed Free Air's request for extraordinary relief and denied its motion to disqualify counsel.

/3 The procedural schedule also specified November 1, 1994 for completion of discovery and November 14, 1994 for exchange of written direct cases.

1995/4 (see Order, FCC 94M-605, released November 4, 1994). In this connection, at the November 2 conference, counsel for Free Air produced an affidavit dated October 25, 1994 from Olga Castellanos' doctor stating that Castellanos, Free Air's 50% principal responsible for its financial certification, was recovering from breast cancer surgery performed on October 17 and would be unable to appear for deposition until the latter part of December 1994 (see Tr. 494). In light of this development, the date for completion of discovery was extended from November 1 to December 31. Counsel for Free Air raised no objections to any of the changes in the procedural schedule adopted at the conference (see Tr. 2527-2530)./5

3. On December 22, 1994, Interactive Media and Peebles Broadcasting sought a four month continuance of the procedural

dates, claiming it had been unable to depose Castellanos. The motion was denied. See Memorandum Opinion and Order, FCC 95M-4, released January 9, 1995./6 In this connection, on December 30, 1994, Yelverton filed a Notice of his withdrawal as counsel for Free Air and directed all correspondence be sent to Castellanos at her home address. To insure that Free Air was made aware of the ruling as soon as possible, a copy was faxed to Yelverton who had agreed to make its contents known to Free Air. See FCC 95M-4, note 3, notwithstanding, Free Air has never requested a continuance of the procedural dates, either because of Castellanos' illness or the withdrawal of its counsel. Moreover, Yelverton reappeared as counsel for Free Air on January 17, 1995 and continues to represent Free Air.

4. Free Air did not exchange its direct case exhibits on January 17, the specified exchange date; no witnesses were made available for cross-examination on the financial issue; and no Free Air attorney was present at the January 31 hearing./7 On January 17, Free Air filed a motion to delete the financial issue added by the Review Board. Free Air recited therein: "The motion to delete is being filed on the January 17, 1995, date for the exchange of hearing exhibits. See, Order, FCC 94M-605; Section 1.4(e) (1) and (j) Olga Castellanos, the Free Air principal who was responsible for the 1986 financial certification, will be unable to testify at the January 30, 1995, hearing. The undersigned counsel has been informed that

she is still suffering from cancer and its side effects. Accordingly, Free Air will rest its case on this motion to delete." On January 30, 1995, Free Air submitted a letter to the Presiding Judge advising that it would not be present at the January 31 hearing and reiterating that "Free Air will rest its case on the January 17, 1995, motion to delete." The motion to delete has been dismissed. See Memorandum Opinion and Order, FCC 95M-48, released February 14, 1995.

/4 The hearing was postponed to January 31, 1994 at the request of counsel for Dawson. Counsel requested the one day postponement because he had been summoned to appear in a proceeding before the Superior Court on January 30, 1995 (See Order, FCC 95M-15).

/5 Counsel for Free Air has not submitted to the Presiding Judge any further statement from Castellanos' doctor concerning her condition.

/6 The ruling put Free Air on notice that it had to produce at the January 30 hearing Castellanos as well as other named "essential witnesses." See par. 5, note 2.

/7 The record was closed on that date after the completion of the hearing on the financial issue added against Malloy.

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5. The Joint Movants now urge the dismissal of Free Air's application. They argue, in light of Free Air's failure to exchange any direct evidence on January 17, and its failure to appear at hearing on January 31, 1995, that Free Air has

failed to prosecute its application and the application must be dismissed. The Presiding Judge agrees.

6. The Commission's Rules, Section 73.3568(b), 47 C.F.R.73.3568 (b), are clear that "failure to prosecute an application...will be cause for dismissal...." Prosecution of an application means timely compliance with procedural and substantive rules, including ALJ orders. Vue-Metrics, Inc., 69 FCC 2d 1049, 1058 (1978). Thus, in Vue-Metrics, the application was dismissed for the failure of the applicant to comply with discovery requests. There are numerous other instances where the failure to comply with an ALJ order also resulted in the dismissal of applications. See, for example, H.S. Communications, 6 FCC Rcd 3609 (Rev. Bd. 1991) (failure to exchange direct case and failure of a principal to appear at deposition); Josie FM Limited Partnership, 6 FCC Rcd 891 (Rev. Bd. 1991) (failure to produce documents and witnesses); Lorraine W. Arms, 5 FCC Rcd 3426 (Rev. Bd. 1990), rev. denied, 5 FCC Rcd 7013 (1990) (failure to produce witness at hearing); Carroll, Carroll & Rowland, 4 FCC Rcd 7149 (Rev. Bd. 1989), rev. denied, 5 FCC Rcd 2430 (1990) (failure to go forward with discovery); Carol S. Bowen, 6 FCC Rcd 10, 12 (Rev. Bd. 1991) (failure to produce documents). Dismissal of Free Air's application for its failure to exchange its direct case and appear at the hearing is fully consistent with the above cited precedent.

7. Dismissal of Free Air's application

also fully comports with the standards for dismissal set out in Communi-Center Broadcasting, Inc. v. FCC, 856 F.2d 1551, 1554 (D.C. Car. 1988). "In reviewing the dismissal of an applicant from a comparative proceeding, we think it clear that among the factors appropriate for consideration are the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct."

8. Free Air's proffered justification provides no valid excuse for its failure to comply with the Presiding Judge's order. Free Air's main justification appears to center on the health of Castellanos. However, Castellanos' health does not explain Free Air's failure to exchange its direct case. Moreover, Free Air never sought a continuance on that ground or any other ground, for that matter. Also, Castellanos' alleged poor health/8 does not explain Free Air's unwillingness to offer the testimony of other essential witnesses. Thus, it appears that Castellanos' medical problem is nothing more than a smokescreen to hide Free Air's real reason for not offering evidence on the financial issue added by the Board, namely, its unwillingness to subject its financial showing to the scrutiny of its opponents. Free Air has chosen, instead, to move to delete the issue on the ground that the issue should

not have been specified in the first place. Free Air states in this regard, that it will appeal the denial of its motion to delete "to the Review Board, and if necessary to the Commission and then to the U.S. Court of Appeals Circuit" (Opposition, p. 2). while Free Air is free to pursue this strategy, it cannot escape the consequences of failing to prosecute its application. WWOR-TV, Inc., 4 FCC Rcd 8127, 8128 (Rev. Bd. 1989)./9

/9 It should be noted that other than the doctor's statement of October 25, 1994 which led to the modification of the original procedural schedule, no further medical reports have been submitted.

/10 Free Air cites GAF Broadcasting Co., 96 FCC 2d 411 (Rev. Bd. 1984) for the proposition that dismissal of an applicant is not warranted where the failure to prosecute results from a principal not testifying at a hearing because of a medical problem. GAF is inapposite. Unlike Free Air, in GAF the applicant exchanged its exhibits and also produced its principal at the hearing. Also, when its principal was unable to continue testifying, the applicant, supported by a medical statement sought a continuance. Other cases cited by Free Air are also inapposite. Innovative Women's Media Association v. FCC, 16 F.3d 1287 (D.C. Cir. 1994), The Dunlin Group, 6 FCC Rcd 4642, 4643 (Rev. Bd. 1991), and Sound Broadcasting Co., 6 FCC Rcd 3626, 3627 (Rev., Bd. 1991) all differ from Free Air in one critical respect. The above cases

involved situations where the applicants actively sought to go forward on the issues designated against them. Here the opposite is true. Free Air exchanged no direct case testimony, no witnesses were made available for cross examination, no Free Air attorney was present at hearing and it has never moved for a continuance of the procedural dates.

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9. Free Air also urges that even if Free Air had no reasonable excuse for not appearing at hearing, denial of its application, rather than dismissal, is appropriate, citing GAF. Free Air is plainly wrong. In GAF, the applicant made "serious and good faith efforts to place its financial showing in evidence, and did not willfully default in the prosecution of its case" (96 FCC 2d 411, 417, para. 11). Here, Free Air has willfully defaulted in the prosecution of its case. Dismissal, rather than denial of its application, is called for. Local Morgan Hill, 4 FCC Rcd 2404 (Rev. Bd. 1989).

10. Free Air has made a number of other frivolous arguments which deserve brief mention. Free Air's assertion that the parties lost the right to cross examine its witnesses because of the failure to seek depositions of persons other than Castellanos and to request cross-examination is ludicrous. The failure to take depositions does not bar the right to cross examine. Moreover, since Free Air did not exchange exhibits, there was no direct case on which the parties could have cross examined. Free Air also asserts

that there would have been a conflict of interest had it presented for cross-examination one of the persons relied on for financing. As noted by the Joint Movants in their Reply (page 3), Free Air knew since January 9, 1995 of the problem but never sought recusal of the attorney with the alleged "conflict of interest." Moveover, the alleged "conflict of interest" does not excuse Free Air's failure to submit a direct case. Further, as discussed, supra, Free Air's only stated reason for failure to make that witness and other "essential witnesses available for cross examination was not any perceived "conflict of interest" but rather its voluntary decision "to rest its case on a motion to delete issues." similarly, the one day continuance of the hearing could not conceivably have any bearing on Free Air's failure to exchange its case and otherwise go forward with the prosecution of its case. Finally, Free Air's claim that the joint motion to dismiss was not properly signed and is procedurally defective is fully refuted by the Joint Reply (see page 5).

11. In sum, Free Air's proffered justification for its failure to comply with the Presiding Judge's Order is completely lacking in merit. Further, given the fact that Free Air has already been afforded an opportunity to come forward with evidence to meet its burden on the issue added by the Board, which it has spurned, burdening the administrative system further with its application would be an unconscionable waste of the

Commission's time and resources. Also, there would be manifest prejudice to Free Air's opponents if they were required to participate in yet another hearing session on Free Air's financial qualifications merely because Free Air defied the Presiding Judge's procedural order. Finally, dismissal of Free Air's application serves the public interest since it will have a deterrent effect on counsel who defy ALJ orders. Free Air's application will, therefore, be dismissed.

Accordingly, IT IS ORDERED, That the "Joint Motion To Dismiss Free Air Application" filed February 3, 1995 by Peebles Broadcasting Company, James S. Lee and Donald L. Baker, d/b/a Interactive Media, Bernard Dawson, and Special Markets Media, Inc. IS GRANTED; and the application of Free Air Corporation IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin

Administrative Law Judge

APPENDIX D, MEMORANDUM OPINION AND ORDER, FCC 95R-08, rel. May 5, 1995, 10 FCC Rcd 4974 (Rev. Bd. 1995)

By the Review Board: MARINO (Chairman) and GREENE.

1. The Review Board has before it for consideration: (1) an Appeal filed February 27. 1995, by Free Air Corporation from a Memorandum Opinion and Order, FCC 95M-60, rel. February 23, 1995. (MO&O), by ALJ Joseph Chachkin, dismissing Free Air's application; and (2) Free Air's Motion to Stay filed on the same date requesting a stay of the effectiveness of the above order. Joint Oppositions to the Appeal and Motion to Stay were filed on March 3, 1995, by Peebles Broadcasting Company, Interactive Media, and Bernard Dawson. For the reasons set forth below, we will deny the appeal and dismiss the stay as moot.

2. On a joint motion to dismiss filed February 3, 1995, by all of the opposing applicants, the ALJ dismissed Free Air's application for failure to prosecute because Free Air elected not to exchange any direct evidence on a financial qualifications issue designated against it or to appear at the January 31, 1995,

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/1 In remanding the financial qualifications issue against Free Air, the Board had assumed that its other principal was at least partially responsible for Free Air's financing, but the specified issue required Free Air to demonstrate the applicant's qualifications at the time of certification and subsequently.

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hearing scheduled for trial of the issue. That issue, along with a basic qualifying issue against Rem Malloy Broadcasting, had been added by the Board on September 12, 1994, in an order remanding the case to the ALJ. Memorandum Opinion and Order, 9 FCC Rcd 4822 (Rev. Bd. 1994), pet. for extraordinary relief dismissed, 10 FCC Rcd 503 (1995). At a conference held on November 2, 1994, the ALJ extended the procedural schedule previously established in this case, after counsel for Free Air produced an October 1994 physician's affidavit averring that Olga Castellanos, Free Air's fifty percent owner, was recovering from breast cancer surgery performed on October 17 and would not be able to appear for deposition until the latter part of December 1994. MO&O at 2. In moving to dismiss the remanded issue, Free Air had claimed that Castellanos was the principal solely responsible for Free Air's financial certification./1 The ALJ also denied a subsequent joint motion for continuance filed by two other applicants, who complained they had been unable to depose Castellanos. Although Free Air supported the motion, it offered no documentation of Castellanos' medical condition, and the ALJ saw no reason to delay the hearing relative to Rem Malloy. Memorandum Opinion and Order, FCC 95M-4, rel. January 9, 1995. Notwithstanding the ALJ's extension of the original procedural dates to accommodate Castellanos, Free Air did not exchange its direct case exhibits on January 17, 1995, the revised date set for the exchange of exhibits. Instead, on

that date, Free Air filed a motion to delete the financial issue specified by the Board, asserting that Castellanos would be unable to testify at hearing and that Free Air would rest its case on the motion to delete. Id. at 4. Free Air again offered no medical certificate to support its opposition. Free Air did not attend the hearing, which the ALJ had rescheduled to January 31, 1995. It submitted a letter to the ALJ on January 30 declaring that it would not be present at the hearing and repeating its representation that it would rest its case on the motion to delete. Id. The ALJ refused to grant the motion to delete because substantial questions of fact remained to be resolved. Memorandum Opinion and Order, FCC 95M-48, rel. February 14, 1995.

3. In dismissing Free Air's application, the ALJ held that Free Air's proffered justification centering on Castellanos' health provided no valid excuse for its failure to comply with his order. MO&O at 8. He stated that "Castellanos' health did not explain Free Air's failure to exchange its direct case" nor did it "explain Free Air's unwillingness to offer the testimony of other essential witnesses. " Id. Free Air never sought a continuance predicated on Castellanos' health or other grounds, nor did it submit a further medical report on Castellanos' health after the doctor's statement of October 1994. Id. & n.8. The ALJ concluded that the proffered justification was a pretext and that "Free Air's real reason for not offering

evidence on the financial issue added by the Board [was] its unwillingness to subject its financial showing to the scrutiny of its opponents." Id. at 8. The ALJ also rejected Free Air's argument that denial of the application, rather than its dismissal, was the appropriate course of action if an applicant had no reasonable excuse for not appearing at hearing. Id. at 9. Finally, he analyzed Free Air's putative misconduct under the standards for dismissal set forth by the Court of Appeals for the District of Columbia Circuit in Comuni-Center Broadcasting, Inc. v. FCC, 856 F.2d 1551, 1554 (D.C. Cir. 1988),/2 stating: [G]iven the fact that Free Air has already been afforded an opportunity to come forward with the evidence to meet its burden on the issue added by the Board, which it has spurned, burdening the administrative system further with its application would be an unconscionable waste of the Commission's time and resources. Also, there would be manifest prejudice to Free Air's opponents if they were required to participate in yet another hearing session on Free Air's financial qualifications merely because Free Air defied the Presiding Judge's procedural order. Finally, dismissal of Free Air's application serves the public interest since it will have a deterrent effect on counsel who defy ALJ orders. MO&O at 11.

4. Free Air contends in its appeal, citing GAF Broadcasting Co., 96 FCC 2d 411 (Rev. Bd. 1984), that "the dismissal of an application is not warranted where the

purported failure to prosecute results from a principal of the applicant not testifying because of a medical problem and where the ALJ had refused to grant a continuance on the basis of such medical problem." Br. at 3. Free Air argues that, because the ALJ had already denied a continuance, "it would have been futile for Free Air to make another request or to submit an additional affidavit from a doctor." Id. at 4. It also argues that it would have been "futile" to submit a partial case since the ALJ considered Castellanos to be an essential witness, and thus, perforce it had no choice but to prosecute its case through a motion to delete the financial issue. Id. Free Air's final contention is that there is no factual or legal basis to dismiss its application. Br. at 5.

5. Discussion. Free Air's reliance on GAF for reinstatement of its application is misplaced. There, the presiding ALJ refused to allow a continuance of the hearing where it was alleged that an essential witness, who had been taken ill during his testimony, was unavailable to continue testifying because of poor health. The request for the continuance was supported by a letter from the witness' physician stating that the witness could not testify until the end of summer, and the physician had sent a telegram advising the ALJ he had ordered his patient not to testify at the scheduled hearing. The Board held that the ALJ's ruling was arbitrary and an abuse of discretion. 96 FCC 2d at 413, para. 5.

Additionally, the GAF applicant had diligently continued to pursue its application, first by submitting the witness, and when he was unable to finish his testimony and the ALJ would not continue the case, by attempting to proceed on schedule with a substitute witness to sponsor the financial exhibit. Here, in contrast, Free Air never sought a continuance or submitted a status update of Castellanos' condition, and it made no attempt to pursue its application by meeting the issue.

/2 The criteria cited by the court consisted of the applicant's proffered justification for the failure to comply with the presiding officer's order; the prejudice suffered by other parties; the burden placed on the administrative system; and the need to punish abuse of the system and to deter future misconduct.

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6. An ALJ has broad discretion in regulating the course of a hearing and will be overturned only if his ruling is arbitrary or an abuse of discretion. GAF, 96 FCC2d at 413. In disallowing the continuance sought by the other parties, the ALJ noted that the proponents failed to make a showing for delaying the hearing concerning Rem Malloy. FCC 95M-4 at 6. Free Air's argument that it would have been "futile" for it to ask for a continuance or to submit an affidavit from the physician is disingenuous. The ALJ had demonstrated at the November 2 conference

that he was amenable to suggestions from the parties concerning various courses of action that would resolve the financial issue against Free Air in an orderly and timely fashion and not jeopardize Castellanos' health. He extended his original procedural dates by adding in the recovery time estimated by Castellanos' physician before she could be deposed. He suggested that the parties contact Castellanos' physician to determine when it would be permissible to take Castellanos' deposition and recommended they might be able to minimize the time and burden of the deposition by deposing Castellanos at her Florida home. Tr. 2522-23. He asked the parties for their views about commencing the hearing toward the end of January or early February 1995 and received no objection from counsel for Free Air. Tr. 2527-28. Having failed to seek a continuance or to submit any updated information from Castellanos' physician on Castellanos' physical condition, Free Air can not complain on appeal that the ALJ's denial of the other parties' request for a continuance - based on Free Air's failure to cooperate with Castellanos' deposition -- was arbitrary or an abuse of discretion.

7. Finally, Free Air's argument that it would have been "futile" to submit a partial case and that it had no choice but to seek deletion of the issue is also without merit. Other than the bare statement that Castellanos was considered an "essential" witness, Free Air, as noted by the ALJ, offered no explanation why it

could not exchange its direct case or offer the testimony of other witnesses. In the Memorandum Opinion and Order, 10 FCC Rcd 503, supra, dismissing Free Air's and Rem Malloy's requests for extraordinary relief seeking reversal of our order adding the issues, the Commission pointed out that "a party may request relief pursuant to summary decision procedures before the ALJ to correct any alleged factual errors underlying the Board's determination to add financial issues against these applicants." 10 FCC Rcd at 505 11. The ALJ found it baffling, in dismissing Free Air's motion to delete, that Free Air failed to avail itself of the summary decision procedures, but noted that, in any event, if a summary decision motion had been based only on the attachments to the motion to delete, it could not have been granted because the attachments showed there are genuine issues of material fact for determination at a hearing. Memorandum Opinion and Order, FCC 95M-48, supra, at n. 3. From our own review of that showing, we agree there was ample basis for the ALJ to find that substantial and material questions of fact continued to exist as to Free Air's financial qualifications. Finally, the ALJ persuasively explained in detail how his dismissal ruling satisfied the factors enumerated in Comuni-Center in determining whether dismissal is warranted./3 His action dismissing Free Air's application rather than simply denying it fully comports with Commission precedent. See, e.g., Beth Knight, 7 FCC Rcd 1889 (Rev.

Bd. 1992) (application dismissed where applicant indicated it would not present evidence on issue allegedly wrongly added); review denied, 7 FCC Rcd 5975./4

8. ACCORDINGLY, IT IS ORDERED, That the Appeal, filed February 27. 1995, by Free Air Corporation IS DENIED; and that Free Air's Motion to Stay filed on the same date IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

/3 The ALJ found Innovative Women's Media Association v. FCC, 16 F.3d 1287 (D.C. Cir. 1994), cited by free Air, inapposite. We agree with the ALJ's conclusion that Innovative is not apposite. There, the applicant's failure to meet the exchange deadline and attend the hearing was attributable to the absence of counsel.

/4 Free Air alleges in passing that the joint motion to dismiss Free Air's application was not properly signed and thus was required to be dismissed. We perceive no need to disturb the ALJ's ruling in this regard. MO&O at 10.

APPENDIX E, ORDER, FCC 95-361, rel. August 25, 1995, 10 FCC Rcd 9502 (1995)

By the Commission:

1. Before the Commission for consideration is our Memorandum Opinion and Order, 10 FCC Rcd 503 (1995), a Petition for Reconsideration filed January 18, 1995 by Free Air Corporation, an Opposition filed January 27, 1995 by Bernard Dawson, and a Reply filed February 3, 1995 by Free Air; the Review Board's Decision in this proceeding, 10 FCC Rcd 4974 (Rev. Bd. 1995), an Application for Review filed May 25, 1995 by Free Air, and an Opposition filed June 9, 1995, by Peebles Broadcasting Company, Interactive Media, and Dawson; together with a Joint Motion for Expedited Consideration of Free Air Corporation's Application for Review filed June 30, 1995 by Dawson, Peebles and Interactive Media, and an Opposition to Joint Motion filed July 6, 1995 by Free Air. Having carefully considered the matters of record herein concerning the Board's ruling, we agree with its disposition of this case and affirm its Decision./1

2. In our preceding order, we denied Free Air's request to disqualify Dawson's counsel based on the latter's purported affiliation with a law firm that had previously represented Free Air in this proceeding, 10 FCC Rcd at 506, paras. 18-21. In seeking reconsideration, Free Air asserts that it has now discovered evidence showing both that Dawson's counsel has filed pleadings with the

Commission using the letterhead of Free Air's former law firm and that files of Free Air in possession of Free Air's former law firm were lost sometime in 1990./2 Based on these circumstances, Free Air contends that Dawson's counsel should be disqualified from participation in this proceeding.

3. Free Air's petition for reconsideration is procedurally deficient and it will be summarily dismissed. Under 47 C.F.R. 1.106(c), a petition for reconsideration which relies on facts not previously presented to the Commission may be granted only if: (a) they relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters, (b) they were unknown to petitioner until after the last opportunity for presentation and could not, through the exercise of ordinary diligence, have been learned prior to such opportunity, or (c) their consideration is required in the public interest. The circumstances on which Free Air now relies clearly relate to events that occurred and that could have reasonably have been learned prior to the filing of its motion to disqualify counsel and they are not of such moment as to establish that further consideration of this matter is required in the public interest. In any event, in light of the fact that Free Air's application has been dismissed for lack of prosecution it does not appear that its contentions about the role of Dawson's counsel in this case have any further relevance in this proceeding.

4. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. 1.106(c) and 1.115(g) the Petition for Reconsideration filed January 18, 1995 by Free Air Corporation IS DISMISSED, the Application for Review filed May 25, 1995 by Free Air Corporation IS DENIED, and the Joint Motion for Expedited Consideration of Free Air Corporation's Application for Review filed June 30, 1995 by Bernard Dawson, Peebles Broadcasting Company and Interactive Media IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton, Acting Secretary

/1 In light of our timely action on Free Air's Application for Review, the Joint Motion for Expedited Consideration is dismissed as moot.

/2 Free Air attached to its petition one page of the transcript of a conference before the ALJ in this proceeding, assertedly indicating that Dawson's counsel filed matters in this proceeding under the letterhead of Free Air's former law firm, and a letter dated November 7, 1994, from a partner in Free Air's former law firm stating that the firm no longer has any files for Free Air in its possession, that a number of its files were destroyed in 1990 due to water damage, add that the writer surmised that any Free Air files that the firm might still have had at that time "were in the boxes that were damaged by the flooding."

APPENDIX F, ORDER, U.S COURT OF APPEALS FOR THE D.C. CIRCUIT, Case No. 95-1490, filed May 22, 1996, Free Air v. FCC

BEFORE: Williams, Henderson, and Tatel, Circuit Judges

Upon consideration of the notices of intention to intervene filed by Peebles Broadcasting Company, Interactive Media, and Bernard Dawson and the consolidated response thereto; the motions for leave to file, the responses thereto, and the replies; the motion for notice of agency action and the response thereto: the motion for summary reversal and remand, the oppositions thereto, and the replies; the motion for summary affirmance, the supplement thereto, and the responses to the motion; the motion for stay, the opposition thereto, and the reply; and the statement for the record, the response thereto, and the reply, it is ORDERED that Peebles Broadcasting Company, Interactive Media, and Bernard Dawson be allowed to intervene. It is FURTHER ORDERED that the motions for leave to file be granted. The Clerk is directed to file the lodged pleadings. It is FURTHER ORDERED that the motion for notice of agency action be granted. It is FURTHER ORDERED that the motion for summary reversal and remand be denied and the motion for summary affirmance be granted in part. With respect to the issues addressed in those motions, we affirm substantially for the reasons stated in the Review Board's order released May 5, 1995, and the administrative law judge's order released

February 23, 1995. The merits of the parties' positions on these issues are so clear as to warrant summary action, see Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Cascade Broadcasting Group), Ltd. v. FCC, 822 F.2d 1172, 1174 (D.C. Cir. 1987), and appellant has not established that a remand is warranted regardless of the disposition of the motion for summary reversal.

It is FURTHER ORDERED, on the court's own motion, that appellant show cause within 30 days of the date of this order why the remainder of the FCC's orders should not be summarily affirmed. Appellant shall address only those issues listed in the notice of appeal but not addressed in the motions for summary disposition. The response to the order to show cause shall not exceed 20 pages. Failure to comply with this order will result in dismissal of the appeal for lack of prosecution. See D.C. Cir. Rule 38.

It is FURTHER ORDERED that the motion for stay be denied. Assuming appellant complied with F.R.A.P. 18, appellant has not satisfied the stringent standards required for a stay pending court review. See Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Cir. Handbook of Practice and Internal Procedures, pp. 68-69 (1994). The Clerk is directed to send a copy of this order to appellant both by certified mail, return receipt requested, and by first class mail.

Per Curiam

APPENDIX G, ORDER, U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, Case No. 95-1490, filed August 28, 1996, Free Air v. FCC

BEFORE: Henderson, Rogers, and Tatel, Circuit Judges

Upon consideration of the Court's order to show cause filed May 22, 1996, and the response thereto, it is ORDERED that the order to show cause be discharged. It is FURTHER ORDERED that those aspects of the FCC's order not affirmed by this Court's order filed May 22, 1996, be summarily affirmed. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980). Assuming appellant's claims survive the dismissal of its application for failure to prosecute, appellant raises no valid challenge to the agency's actions in the proceedings under review.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

APPENDIX H, ORDER, U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT, Case No. 95-1490, filed January 28, 1997, Free Air v. FCC

BEFORE: Henderson, Rogers and Tatel, Circuit Judges

Upon consideration of appellant's petition for rehearing filed October 15, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

Supreme Court, U.S.
FILED
JUN 26 1997
CLERK

No. 96-1717

In the Supreme Court of the United States

OCTOBER TERM, 1996

FREE AIR CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WALTER DELLINGER
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WILLIAM E. KENNARD
General Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether petitioner's application for a broadcast license was properly dismissed because petitioner failed to comply with the scheduling order and failed to appear at the hearing on the merits.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1717

FREE AIR CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (Pet. App. 33a-34a, 35a) are unreported. The decision of the administrative law judge dismissing petitioner's application (Pet. App. 11a) is unreported. The decisions of the Review Board and of the Federal Communications Commission affirming that dismissal (Pet. App. 21a-29a, 30a-32a) are reported at 10 FCC Rcd 4974 and 10 FCC Rcd 9502.

JURISDICTION

The orders of the court of appeals were entered on May 22 and August 28, 1996. A petition for rehearing was denied on January 28, 1997 (Pet. App. 36a). The petition for a writ of certiorari was filed on April 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was one of fifteen applicants for a license to operate a new FM radio station in Raleigh, North Carolina. These applications were designated for a comparative evidentiary hearing in 1988. In 1994, the administrative law judge (ALJ) was directed by the Commission's Review Board to conduct proceedings to determine petitioner's financial qualifications to receive and operate the license. *Rem Malloy Broadcasting*, 9 FCC Rcd 4822, 4827-4830 (Rev. Bd. 1994), petition for extraordinary relief dismissed, 10 FCC Rcd 503 (1995).

The procedural schedule established by the ALJ specified that discovery was to be completed by November 1, 1994, and that petitioner's direct written case was to be exchanged with opposing counsel by November 14, 1994 (Pet. App. 12a). The ALJ modified the procedural schedule on November 2, 1994, after petitioner produced an affidavit from a physician stating that Mrs. Castellanos—one of the two principal officers of petitioner—was recovering from breast cancer surgery performed on October 17 and would not be able to appear for a deposition until the latter part of December 1994 (*id.* at 22a). Under the revised schedule, the hearing on the merits was postponed to January 30, 1995, and the deadline for completing discovery was extended to December 31, 1994 (*id.* at 1a, 11a).

On December 22, 1994, two other applicants for the license filed a joint motion for a four-month continuance, complaining that they had been unable to depose Mrs. Castellanos and that petitioner had failed to comply with document discovery requests (Pet. App. 1a). The ALJ denied the motion because these appli-

cants had not filed a notice establishing a date for the deposition of Mrs. Castellanos and had not attempted to depose other persons in her stead (*id.* at 3a).

Petitioner did not comply with the scheduling order that required all direct case exhibits to be exchanged by January 17, 1995 (Pet. App. 13a). Instead, on that date, petitioner filed a motion to delete the financial issue, asserting that it would rely on documents and affidavits submitted with that motion (*id.* at 3a, 13a-14a, 22a-23a). Petitioner submitted no current medical report to support a contention that Mrs. Castellanos would be unavailable to testify in person or by deposition. Petitioner failed to appear at the January 31 hearing on the merits (*id.* at 14a).*

The ALJ thereafter denied the motion to delete, finding that the motion was untimely and that substantial evidentiary questions existed as to the validity of petitioner's certification of its financial qualifications (Pet. App. 5a-9a). The ALJ noted that the ill-health of one of its principal officers did not excuse petitioner's failure to comply with the scheduling order requirement for the exchange of documents or petitioner's failure to appear at the hearing on the merits (*id.* at 16a). The ALJ stated that the witness's "health did not explain [petitioner's] failure to exchange its direct case" nor did it "explain [petitioner's] unwillingness to offer the testimony of other essential witnesses" (*ibid.*). The ALJ further observed that, even though petitioner asserted that one of its witnesses was ill, petitioner never sought

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* On January 30, petitioner had submitted a letter to the ALJ declaring that it would not be present at the hearing and repeating its representation that it would rest its case on the financial issue on the motion to delete (Pet. App. 14a).

a continuance of the already delayed hearing date and did not seek to supplement the initial medical report, which had indicated that a delay was needed only until the latter part of December 1994 (*id.* at 12a-13a). Against this background, the ALJ concluded that "[petitioner's] real reason for not offering evidence on the financial issue * * * [was] its unwillingness to subject its financial showing to the scrutiny of its opponents" (*id.* at 16a).

The ALJ analyzed petitioner's conduct under the standard for dismissal of agency proceedings set forth in *Comuni-Centre Broadcasting, Inc.* v. *FCC*, 856 F.2d 1551, 1554 (D.C. Cir.), cert. denied, 489 U.S. 1083 (1988). In *Comuni-Centre Broadcasting, Inc.* v. *FCC*, the court held that, among the factors to be considered in reviewing the dismissal of an applicant from a comparative proceeding, the agency should consider "the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct." 856 F.2d at 1554. The ALJ stated (Pet. App. 19a-20a):

> [G]iven the fact that [petitioner] has already been afforded an opportunity to come forward with the evidence to meet its burden on the issue added by the Board, which it has spurned, burdening the administrative system further with its application would be an unconscionable waste of the Commission's time and resources. Also, there would be manifest prejudice to [petitioner's] opponents if they were required to participate in yet another hearing session on [petitioner's] financial qualifications merely because [petitioner] defied the

> Presiding Judge's procedural order. Finally, dismissal of [petitioner's] application serves the public interest since it will have a deterrent effect on counsel who defy ALJ orders.

2. The Review Board upheld the dismissal of petitioner's application (Pet. App. 21a). The Board concluded that the asserted health problems of one of petitioner's witnesses did not justify its failure to exchange its direct evidence on the financial issue or to appear at the scheduled hearing on the merits (*id.* at 25a-26a). The Board distinguished a case cited by petitioner, *GAF Broadcasting Co.*, 96 F.C.C.2d 411 (Rev. Bd. 1984), in which the Board had held that an ALJ acted arbitrarily and capriciously in refusing to allow a continuance of a hearing after an essential witness became ill. The Board explained that, unlike the applicant in *GAF*, petitioner never sought a continuance of the January 31, 1995 hearing, never submitted an update on the condition of its witness, and did not make any attempt to pursue its application by proceeding on schedule with a substitute witness (Pet. App. 26a).

The Board rejected petitioner's claim that it would have been "futile" to ask for a continuance or to submit an affidavit from a physician. The Board noted that the ALJ had demonstrated a willingness to accommodate the health concerns of petitioner's witness by previously amending the scheduling order upon a proper application (Pet. App. 27a):

> [The ALJ] was amenable to suggestions from the parties concerning various courses of action that would resolve the financial issue * * * in an orderly and timely fashion and not jeopardize Castellanos' health. He extended his original pro-

> cedural dates by adding in the recovery time estimated by Castellanos' physician before she could be deposed. He suggested that the parties contact Castellanos' physician to determine when it would be permissible to take Castellanos' deposition and recommended they might be able to minimize the time and burden of the deposition by deposing Castellanos at her Florida home. Tr. 2522-2523. He asked the parties for their views about commencing the hearing toward the end of January or early February 1995 and received no objection from counsel for [petitioner].

The Board noted that petitioner had failed to explain why it could not exchange its direct case or offer the testimony of other witnesses at the scheduled hearing (*id.* at 26a-28a).

The Commission affirmed the dismissal of the application for the reasons stated by the Review Board (Pet. App. 30a).

3. In an unpublished decision, the court of appeals affirmed the Commission's decision "substantially for the reasons stated in the Review Board's order * * * and the [administrative law judge's] order" (Pet. App. 33a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

The sanction of dismissal is appropriate for a party's failure to comply with a scheduling order and its failure to attend the hearing on the merits of the case. Dismissal is an appropriate means of punishing and deterring misconduct by litigants. *National*

Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-643 (1976) (per curiam). The rules of the Commission plainly warn that "failure to prosecute an application * * * will be cause for dismissal" (Pet. App. 15a, citing 47 C.F.R. 73.3568(b)). The decisions of the Commission dismissing applications under this rule for failure to prosecute have consistently been upheld when, as here, the applicant failed to comply with discovery requests or with scheduling orders. See, *e.g.*, *Comuni-Centre* v. *Broadcasting, Inc.* v. *FCC*, 856 F.2d at 1554 (upholding dismissal for filing pleading twelve days after ALJ's deadline); *H.S. Communications, Inc.*, 6 FCC Rcd. 3609 (Rev. Bd. 1991) (application dismissed for failure to exchange direct case as scheduled and failure of a principal to appear at deposition); *Vue-Metrics, Inc.*, 69 F.C.C. 2d 1049, 1050 (1978), aff'd, 615 F.2d 1369 (D.C. Cir. 1980) (Table) (application dismissed for failure to comply with discovery requests).

The dismissal of petitioner's application for failure to prosecute was proper in this case. Contrary to petitioner's contentions (Pet. 18), the ALJ was not insensitive to the possible impact of the medical condition of petitioner's witness on its ability to prosecute the application. Indeed, after receiving an affidavit from the witness's physician averring that she would not be able to be deposed until the latter part of December 1994, the ALJ granted a two month extension of the deadline for completing discovery until December 31, 1994 (Pet. App. 2a). Petitioner never produced further affidavits indicating that her physical condition required any additional delay (*id.* at 3a). Nor did petitioner move for a continuance of the scheduled hearing on the merits. Instead, petitioner simply failed to attend (*id.* at 14a).

The Review Board carefully and thoroughly considered and rejected petitioner's factual contention (Pet. App. 27a). The court of appeals adopted the findings of the Board (*id.* at 33a). Further review of these factual determinations, concurred in by both tribunals below, is not warranted. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

Not only did petitioner fail to make its principal witness available, it also refused to offer evidence from other sources on the financial issue against it. Petitioner's proffered motion to delete raised additional questions about its financial condition (Pet. App. 8a). The ALJ's finding that petitioner's failure to prosecute its application at the scheduled hearing stemmed from its "unwillingness to subject its financial showing to the scrutiny" of the opposing applicants (*id.* at 16a) finds ample support in the record.

Petitioner errs in relying (Pet. 12) on *Societe Internationale pour Participations Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197 (1958). The Court in *Rogers* held that the sanction of dismissal was inappropriate when a party failed to obey a discovery order "due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Id.* at 212. Petitioner's failure to comply with the scheduling order, and its failure to attend the hearing on the merits, resulted from its willful decision, not from inability. This factual determination, reached by the agency and affirmed by the court of appeals, does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

WILLIAM E. KENNARD
General Counsel
Federal Communications Commission

JUNE 1997

Supreme Court, U.S.
FILED
JUL 10 1997
OFFICE OF THE CLERK

(3)

Case No. 96-1717

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

FREE AIR CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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July 1997

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PETITIONER'S REPLY BRIEF

The Petitioner, Free Air Corporation ("Free Air"), hereby submits its reply to the opposition brief of the Respondent, Federal Communications Commission ("FCC").

ARGUMENTS

The FCC Ignored a Key Issue Raised in the Petition for Writ of Certiorari

The opposition brief of the FCC ignored a key issue raised by Free Air in its brief, at pp. 14-16. That issue is whether the Court's decision in Link v. Wabash Railroad Co., 370 U.S. 626 (1962), upholding the authority of tribunals to dismiss litigants for failure to prosecute, should be expressly limited to circumstances where the litigant has engaged in a protracted pattern of delay or neglect in prosecuting its case, and not just a single instance (even if done in bad faith), where lesser sanctions would be appropriate.

In the case of Free Air, the FCC found only a single instance of delay (App. 21a). This one instance occurred after six years of active and continuous prosecution by Free Air of its case. Hearing Designation Order, 3 FCC Rcd 4375 (MMB 1988). This one instance of delay also occurred after the FCC had "frozen" the prosecution of its broadcast hearing proceedings. Freeze Orders, 9 FCC Rcd 1055 (1994).

The FCC Improperly Characterized its Conclusions of Law in this Case as Findings of Fact

In its opposition brief, the FCC improperly characterized its conclusions of law in this case as findings of fact. See, Blau v. Lehman, 368 U.S. 403, 409 (1962). The FCC did so in an attempt to make it appear that the facts of Free Air's case do not come within the holding of Societe Internationale v. Rogers, 357 U.S. 197 (1958). This decision holds that an "inability" to comply with a trial or hearing schedule does not warrant the sanction of dismissal.

According to the FCC, at p. 8, Free Air's failure to comply with the hearing schedule resulted from its "willful" decision, not from an "inability" to comply. However, the FCC ignored uncontroverted matters in the record demonstrating Free Air's inability to comply with the hearing schedule (App. 1a-4a).

Several weeks prior to the scheduled hearing in Washington, D.C., the ALJ denied a joint motion for continuance and ordered a principal of Free Air, Olga V. Castellanos, to testify as an "essential" witness. This was in spite of the fact that she was then undergoing post-surgery radiation treatments for breast cancer at a Miami, Florida, hospital. The ALJ knew of Mrs. Castellanos' long-standing medical condition, did not then request or demand

a further statement from her doctor, and ordered that the hearing would be held regardless of her medical condition (App. 1a-4a).

Because of the ALJ's refusal to continue the hearing and his order for Mrs. Castellanos' to testify as an "essential" witness, in spite of the fact that she was then undergoing post-surgery radiation treatments for breast cancer, Free Air was forced into a position where it would be in default at the scheduled hearing because of the unavoidable absence of Mrs. Castellanos. Free Air thereby elected to prosecute its case through a motion to delete the financial issue in question in order not to be in default.

Another conclusion of law that the FCC improperly characterized as a finding of fact is that Mrs. Castellanos refused to testify merely to prevent Free Air's financial qualifications from being scrutinized by the opposing applicants. See, FCC Opposition Brief, at p. 8. However, the FCC ignored the fact that Free Air's motion to delete included all documentation as to its financial qualifications, along with an affidavit from Mrs. Castellanos detailing the basis of her 1986 financial certification. This documentation had been produced to the opposing parties during discovery (App. 3a, 8a-9a).

The matters included in the motion to delete would have been the same matters to be submitted in a hearing exhibit. Indeed,

it would have been the same showing to be presented at the hearing, other then Mrs. Castellanos' live testimony, which was not possible to be given.

This full disclosure by Free Air of its financial qualifications in the motion to delete wholly refutes the unsupported contention of the FCC, in its opposition brief, at p. 8, that Mrs. Castellanos refused to attend the hearing and testify in order to prevent Free Air's financial qualifications from being scrutinized by the opposing applicants. Free Air's financial disclosure demonstrates that it was acting in "good faith" to prosecute its application and that its actions clearly bring it within the holding of Societe Internationale v. Rogers, 357 U.S. 197.

In its opposition brief, at p. 2, the FCC suggested that Free Air failed to comply with document discovery requests. However, it ignored that the ALJ determined that Free Air had complied with such discovery requests in "good faith" (App. 3a). This compliance with document discovery requests further brings Free Air's actions within the holding of Societe Internationale v. Rogers.

The reliance of the FCC, in its opposition brief, at pp. 6-7, on National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642-643 (1976), is wholly misplaced. In that case, the dismissed party failed to comply with

discovery requests over a seventeen month period. Id., 640. As previously noted, in the case of Free Air, the ALJ determined that it had complied with discovery in "good faith" (App. 3a). Moreover, as previously noted, another fact which distinguishes National Hockey League is that Free Air's failure to comply with the hearing schedule resulted from Mrs. Castellanos undergoing post-surgery radiation treatment for breast cancer.

The FCC's Attack on Mrs. Castellanos Demonstrates Gender Discrimination

The FCC's attack on Mrs. Castellanos, in its opposition brief, at p. 8, contending (contrary to the record) that she refused to attend the scheduled hearing merely to prevent Free Air's financial qualifications from being scrutinized, and not because she was suffering from breast cancer and undergoing post-surgery radiation treatments, demonstrates gender discrimination of the worst sort. See, Petitioner's Brief, at pp. 17-19.

This unwarranted attack on Mrs. Castellanos' character by the FCC and flimsy rationalization for its decision convincingly shows that it does not take seriously the medical complications resulting from breast cancer --- an illness unique to women. According to the FCC, breast cancer is just an excuse for women to use and is not a real illness.

CONCLUSIONS

WHEREFORE, in view of the foregoing, the Court is urged to grant Free Air's petition for writ of certiorari.

Respectfully submitted,

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July 1997